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In The
Supreme Court of the United States

INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA, INC. and NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INC.,

Petitioners,

v.

JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States of America,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. UNDER GLBA, STATES CONTINUE TO REGULATE THE BUSINESS OF INSURANCE	3
II. CONGRESS ESTABLISHED A "PREVENT OR SIGNIFICANTLY INTERFERE" PREEMPTION STANDARD FOR STATE LAWS RELATING TO CERTAIN INSURANCE ACTIVITIES BY NATIONAL BANKS	5
A. In enacting GLBA, Congress codified "prevent or significantly interfere" as the preemption standard	5
B. The "prevent or significantly interfere" standard is consistent with, and required by, "the legal standards for preemption set forth in . . . Barnett"	7
1. The preemption standards of *Barnett*, direct courts to determine the intent of Congress with respect to the preemption of State laws in GLBA	7
2. "Prevent or significantly interfere" was widely understood to be the rule in *Barnett* before Congress definitively codified this standard in GLBA	11

TABLE OF CONTENTS – Continued

Page

C. The statutory context of "prevent or significantly interfere" indicates its heightened threshold for preemption of certain statutes 12

III. THE LEGISLATIVE HISTORY ILLUMINATES CONGRESSIONAL INTENT TO CODIFY A HIGH "PREVENT OR SIGNIFICANTLY INTERFERE" PREEMPTION STANDARD 14

A. The GLBA Senate Report is based on a clearly erroneous reading of *Barnett*, which conflicts with the plain language of GLBA 14

B. The GLBA Senate Report is not persuasive legislative authority 16

IV. THE OCC'S INTERPRETATION OF GLBA IS NOT ENTITLED TO DEFERENCE 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Anderson Nat. Bank v. Luckett, 321 U.S. 233 (1944).....15

Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996).....*passim*

Bowler v. Hawke, 320 F.3d 59 (1st Cir. 2003)..... 2

Browder v. Tipton, 630 F.2d 1149 (6th Cir. 1980).....17

California Fed. Sav. & Loan v. Guerra, 479 U.S. 272 (1987)..... 5

Chevron, U.S.A., Inc. v. Natural Resources Def. Council Inc., 467 U.S. 837 (1984) 19

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980)..... 5

Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548 (1976).....17

Hines v. Davidowitz, 312 U.S. 52 (1941) 8, 9

Independent Bankers Ass'n of America v. Farm Credit Admin., 164 F.3d 661 (D.C. Cir. 1999).....13, 18

Jones v. Rath Packing Co., 430 U.S. 519 (1977)..... 9

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).....19

McClellan v. Chipman, 164 U.S. 347 (1896) 15

National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353 (1869).....15

New York Bankers Ass'n, Inc. v. Levin, 999 F. Supp. 716 (W.D.N.Y. 1998) 11

Pappas v. Buck Consultants, Inc., 923 F.2d 531 (7th Cir. 1991).....18

Qi-Zhou v. Meissner, 70 F.3d 136 (D.C. Cir. 1995).....16

TABLE OF AUTHORITIES – Continued

Page

Russello v. United States, 464 U.S. 16 (1983) 13

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 19

United States v. Mead Corp., 533 U.S. 218 (2001) 19

United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972) 13

Valley Nat'l Bank v. Lavecchia, 59 F. Supp. 2d 432 (D.N.J. 1999) 11

STATUTES

Gramm-Leach-Bliley Act, 15 U.S.C. § 6701(a) (Supp. 2001) 4

Gramm-Leach-Bliley Act, 15 U.S.C. § 6701(c)(1) (Supp. 2001) 12, 13

Gramm-Leach-Bliley Act, 15 U.S.C. § 6701(d)(1) (Supp. 2001) 13

Gramm-Leach-Bliley Act, 15 U.S.C. § 6701(d)(2)(A) (Supp. 2001) ..... *passim*

Gramm-Leach-Bliley Act, 15 U.S.C. § 6701(d)(2)(C)(iii) (Supp. 2001) 10

Gramm-Leach-Bliley Act, 15 U.S.C. § 6711 (Supp. 2001) 4

McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1997) 2, 4

OTHER AUTHORITIES

145 Cong. Rec. S6046-6047 (daily ed. May 26, 1999) 16, 17

H.R. Conf. Rep. No. 106-434, *reprinted in* 1999 U.S.C.C.A.N. 245 ..... 17, 18

TABLE OF AUTHORITIES – Continued

Page

Jeffrey H. Thomas, *Barnett Banks Brings the Business of Insurance to the Attention of Congress*, 20 U. Ark. Little Rock L.J. 129, 140 (1997)... 11, 12

Julie L. Williams, Stuart E. Feldstein & Karen E. McSweeney, *After Barnett: The Intersection of National Bank Insurance Powers and State Regulation*, 1 N.C. Banking Inst. 13, 28 (1997) 12

Linda Birkin Tigges, *Functional Regulation of Bank Insurance Activities: The Time Has Come*, 2 N.C. Banking Inst. 455, 466 (1998) 12

S. Rep. No. 106-44 (1999)..... 14-18

Pursuant to Supreme Court Rule 37, the National Association of Insurance Commissioners (NAIC)[1] submits this Brief in support of petitioners, the Independent Insurance Agents and Brokers of America, Inc. and the National Association of Professional Insurance Agents, Inc., in respectfully requesting that the Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit entered in this action.

INTEREST OF THE AMICUS CURIAE

The NAIC is comprised of the chief insurance regulators of the 50 States, the District of Columbia, and four United States territories. The NAIC acts to support regulators in achieving fundamental objectives relating to insurance regulation, of which consumer protection is paramount.

The NAIC's interest in this litigation concerns a standard for preemption of State laws contained in an opinion letter regarding West Virginia insurance statutes issued by the Office of the Comptroller of the Currency (OCC) and upheld by the Fourth Circuit. The NAIC believes the Fourth Circuit's affirmation of a low threshold for preemption of State insurance laws sets a dangerous precedent and contravenes the intent of Congress in enacting Section 104(d)(2)(A)[2] of the Gramm-Leach-Bliley Act (GLBA).[3]

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[1] Pursuant to Supreme Court Rule 37.2(a), parties to this action consent to the filing of this Brief. Letters of consent accompany this Brief. Pursuant to Supreme Court Rule 37.6, this Brief was authored in whole by undersigned counsel for the NAIC. No person, other than the amicus curiae, made a monetary contribution to the preparation or submission of the Brief.

[2] 15 U.S.C. § 6701(d)(2)(A) (Supp. 2001). For familiarity of reference, when referring to a section of the Gramm-Leach-Bliley Act

(Continued on following page)

Such summary affirmation of the OCC's low preemption threshold also conflicts with a decision issued in an action in the United States Court of Appeals for the First Circuit concerning an OCC preemption opinion involving Massachusetts law.[4] Further, the NAIC is aware of pending requests for OCC preemption opinions relating to Louisiana, Puerto Rico, and Rhode Island law. Because of the threat of additional preemption opinions being issued and the employment of this low preemption threshold that potentially erodes power of the State insurance regulators to protect insurance consumers, the NAIC seeks to appear before this Court.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1997), ensures that States shall regulate the business of insurance, unless Congress specifically provides otherwise. That the business of insurance remains within the preserve of State regulation is a fundamental principle of "functional regulation," under which all insurance activities are regulated by State insurance commissioners whether carried out by insurers or banks. The concept of functional regulation is codified in GLBA. Specifically regarding insurance regulation, GLBA re-affirmed the applicability of the McCarran-Ferguson Act subject to certain preemption rules, one of which is at issue presently.

State laws relating to insurance sales, solicitation, and cross-marketing activities by national banks are addressed by Section 104(d)(2)(A), which provides for their

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(GLBA), this Brief refers to sections of GLBA by their section numbers within that legislation as opposed to where codified within the United States Code.

[3] Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

[4] *See Bowler v. Hawke*, 320 F.3d 59 (1st Cir. 2003).

preemption in limited circumstances. As the NAIC will explain, Congress codified a high "prevent or significantly interfere" threshold for preemption of State laws relating to insurance sales, solicitation, and cross-marketing activities by national banks. To avoid the outcome whereby State laws are subjected to a preemption threshold unintended by Congress, the NAIC supports petitioners in respectfully requesting that this Court issue a writ of certiorari in this matter.

SUMMARY OF ARGUMENT

The Fourth Circuit upheld an opinion letter by the OCC, which erroneously states the legal standard for preemption of State laws relating to insurance sales, solicitation, and cross-marketing activities by national banks. Congress codified the landmark "prevent or significantly interfere" standard articulated by the Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). If accepted by this Court, the OCC's standard, under which virtually any interference by a State law results in preemption, would set a dangerous precedent under which the OCC could preempt State laws in a manner wholly contrary to Congress' intent in establishing the functional regulation framework in GLBA.

ARGUMENT

I. UNDER GLBA, STATES CONTINUE TO REGULATE THE BUSINESS OF INSURANCE.

The central regulatory principle codified within GLBA is "functional regulation." From an insurance perspective,

functional regulation means that State insurance regulators will regulate the business of insurance. Section 301[5] explicitly states that "[t]he insurance activities of *any person (including a national bank . . .)* shall be functionally regulated by the States, subject to section 104" (emphasis added). Section 104, "Operation of State Law," establishes a strong presumption in favor of State insurance regulation by explicitly re-affirming the McCarran-Ferguson Act, clearly stating that it "remains the law of the United States." 15 U.S.C. § 6701(a) (Supp. 2001).

Within the McCarran-Ferguson Act, Congress "declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011 (1997). Further, "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a) (1997).

State insurance regulation, therefore, is a Congressional delegation. In GLBA, Congress expressly preserved and reiterated State regulation of the business of insurance. Thus, the provisions of GLBA relating to preemption of State laws concerning the insurance activities of national banks must be read against the longstanding Congressional policy that insurance activities be regulated at the State level regardless of who is conducting the business of insurance.

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[5] 15 U.S.C. § 6711 (Supp. 2001).

II. CONGRESS ESTABLISHED A "PREVENT OR SIGNIFICANTLY INTERFERE" PREEMPTION STANDARD FOR STATE LAWS RELATING TO CERTAIN INSURANCE ACTIVITIES BY NATIONAL BANKS.

A. In enacting GLBA, Congress codified "prevent or significantly interfere" as the preemption standard.

Courts examine the preemptive effect of State law upon national bank activities using ordinary preemption principles, under which a court's "sole task is to ascertain the intent of Congress" with respect to preemption. *California Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 280 (1987). By enacting GLBA, Congress codified an explicit preemption standard derived from the Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). Section 104(d)(2)(A) states:

> In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in [*Barnett*], no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.

Where Congress codifies a standard, courts must respect the unambiguous statutory language. In interpreting statutes, courts "begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Further, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* Here, Section

104(d)(2)(A) expresses a clear and unambiguous preemption formulation through the words "prevent or significantly interfere."

The reference to *Barnett* in GLBA reinforces, rather than alters, the plain language of "prevent or significantly interfere." The structure of Section 104(d)(2)(A) establishes this fact. The dominant part of Section 104(d)(2)(A) is the clause stating that "no State may . . . prevent or significantly interfere with" a national bank's ability to engage in any insurance sales, solicitation, or cross-marketing activities. The "in accordance with" clause is subordinate to this principal clause. The principal "prevent or significantly interfere" clause sets the standard, and the subordinate clause indicates Congress' belief (and resulting statutory intent) that such clause is to be read and understood to be "in accordance" with the *Barnett* decision. Any contrary interpretation inverts the proper reading of the Section 104(d)(2)(A) preemption rule, making the "prevent or significantly interfere" clause subordinate to the "in accordance with" clause.

In choosing to tie *Barnett* to "prevent or significantly interfere" within Section 104(d)(2)(A), Congress declares its legislative intent to codify the words "prevent or significantly interfere" as well as its interpretation that *Barnett* means "prevent or significantly interfere." Of all of the supposed variety of preemption standards discussed in *Barnett*, Congress codified one to apply to the laws at issue here. To the extent that there may be any ambiguity concerning "prevent or significantly interfere," Congress settles the matter. Only by applying the "prevent or significantly interfere" standard will courts properly maintain Congress' clearly expressed intent.

B. The "prevent or significantly interfere" standard is consistent with, and required by, "the legal standards for preemption set forth in . . . Barnett."

1. The preemption standards of *Barnett* direct courts to determine the intent of Congress with respect to the preemption of State laws in GLBA.

Barnett, like all Supremacy Clause cases, sought to resolve only one issue. "This question is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?" *Barnett*, 517 U.S. at 30.

In *Barnett*, this was a fairly laborious task, because "the Federal Statute" in question, the National Bank Act, did not *specifically* address resolution of a perceived conflict between that statute and a State law. Lacking clear Congressional intent regarding the preemptive effect of federal law, the Supreme Court engaged in a detailed analysis of preemption jurisprudence. The Court noted that federal statutes sometimes reveal an explicit Congressional intent regarding preemption (as with GLBA), but more often (unlike GLBA), they do not. *Id.* at 31. The latter situation, where federal preemption may be implicit, requires a court to uncover Congressional intent from such factors as statutory structure, pervasiveness of the federal scheme, irreconcilable conflicts between State and federal law, and whether State law "stand[s] as an obstacle to the . . . full purposes and objectives of Congress." *Id.* (citations omitted).

In the course of its preemption analysis, the Supreme Court also articulated a legal preemption standard specific to activities by national banks, prevent or significantly

interfere, which plainly establishes a high bar for preemption:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to *forbid, or to impair significantly*, the exercise of a power that Congress explicitly granted. To say this is not to deprive states of the power to regulate national banks, where (unlike here) doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers.

Barnett, 517 U.S. at 33 (emphasis added, citations omitted). Whereas the discussion of other legal standards for preemption related to cases where Congress left a statutory ambiguity about its preemptive effect, Section 104(d)(2)(A) creates no such ambiguity. Congress stated a clear "prevent or significantly interfere" standard, removing the need to sift through an analytical morass created by a lack of clarity "unlike here" in *Barnett*, and clarifying the degree to which Congress intended "to set aside the laws of a State." 517 U.S. at 30. Unlike in *Barnett*, GLBA specifically addresses preemption with a simple standard: Does the State law in question "prevent or significantly interfere" with the ability of a national bank to engage in the enumerated insurance activities?

Vindicating the "prevent or significantly interfere" standard is entirely consistent with *Barnett*'s preemption analysis, particularly its discussion of *Hines v. Davidowitz*, 312 U.S. 52 (1941). *Hines* asked whether a State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67; *see also Barnett*, 517 U.S. at 31. Understood properly, the *Hines* "stands as an obstacle" test should not be used to dilute the "prevent or significantly interfere" preemption rule articulated by the Court and established by

GLBA for bank insurance sales activities. Rather, the *Hines* formula applies to situations where a court analyzes whether the inconsistency between a State law and a federal law's preemptive intent is such that the State law must give way. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *Hines*, 312 U.S. at 67. Lacking clear statutory guidance about Congress' preemptive intent, *Barnett* found the State law in question to be an "obstacle" to Congress' "full purposes and objectives" concerning preemption. By contrast, Section 104(d)(2)(A) gives very clear direction to courts as they determine the "full purposes and objectives of Congress" with respect to the threshold for preemption. Congress' "full purposes and objectives" regarding preemption are clearly spelled out with respect to the relationship between federal and State law by Section 104(d)(2)(A) and other sections of GLBA. These "full purposes and objectives" include: the explicit reaffirmation of the McCarran-Ferguson Act; the codification of the concept of "functional regulation"; and, to effectuate functional regulation, a high presumption in favor of State regulation under the "prevent or significantly interfere" preemption standard.

Thus, the "legal standards for preemption set forth in . . . Barnett" as required by Section 104(d)(2)(A) become clear. Courts are to ascertain Congress' intent with respect to preemption by evaluating the "*full* purposes and objectives" of Congress in passing the statute (emphasis added). Through its application of the "stands as an obstacle" test, the only "purpose and objective" the OCC appears to validate is the right of banks to sell insurance. Through *Barnett* and GLBA, however, the relevant test is not whether State law "stands as an obstacle" to the bank's ability to sell insurance; rather, it is whether State law "stands as an obstacle" to Congress' intent with respect to the preemption or preservation of State law. This intent is explicitly expressed in GLBA: State regulation prevails

unless it is so burdensome that it "prevents or significantly interferes" with a bank's ability to sell insurance. Congress understood *Barnett* to have established a "prevent or significantly interfere" standard with respect to State regulation of bank insurance sales activities, and it explicitly codified this standard. Understood in this context, *Barnett*'s "legal standards" for preemption become clear and its discussion of *Hines* should not be viewed as a tool for abrogating the plain language of GLBA. *Hines* simply illustrates that courts interpreting GLBA should apply Congress' specific "purposes and objectives," including its high "prevent or significantly interfere" threshold for those wishing to preempt the dominant power of the States as the functional regulator of insurance. From the Supreme Court's discussion encompassing "prevent or significantly interfere," there can be no doubt that it serves as the foundation of a high preemption threshold.

Furthermore, the language in Section 104(d)(2)(C)(iii),[6] which states that "[n]othing shall be construed . . . to limit the applicability of" *Barnett*, only buttresses the argument that *Barnett* and GLBA stand for "prevent or significantly interfere." A preemption standard that ignores the "prevent or significantly interfere" standard "limits" the applicability of *Barnett*. In light of *Barnett*'s use of "prevent or significantly interfere" and Congress' codification of this standard, the only logical conclusion is that the preemption standard to be gleaned from *Barnett* is the one that Congress codified: prevent or significantly interfere.

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[6] 15 U.S.C. § 6701(d)(2)(C)(iii) (Supp. 2001).

2. "Prevent or significantly interfere" was widely understood to be the rule in *Barnett* before Congress codified this standard in GLBA.

A review of the language in preemption cases both before and after *Barnett* makes clear that the "prevent or significantly interfere" preemption standard was a unique formulation. A Westlaw search for the phrase "prevent or significantly interfere" uncovered no cases relevant either to preemption of State law or State regulation of bank insurance activities before *Barnett*. The lower courts recognized that *Barnett* was a seminal case; a post-*Barnett* Westlaw search shows that courts applying the Supremacy Clause in preemption cases used the "prevent or significantly interfere" standard at least seven times. *See, e.g., Valley Nat'l Bank v. Lavecchia*, 59 F. Supp. 2d 432, 436 (D.N.J. 1999) ("The *Barnett* court held that Section 92 is not subject to limitation by a state statute that would prevent or significantly interfere with the national bank's exercise of its powers."); *New York Bankers Ass'n, Inc. v. Levin*, 999 F. Supp. 716, 718 (W.D.N.Y. 1998) (quoting *Barnett*, 517 U.S. at 33) ("The [*Barnett*] Court held that although a State may regulate national banks doing business within a State's jurisdiction, a state may not 'prevent or significantly interfere with the national bank's exercise of its [federally conferred] powers.'").

Furthermore, a review of the scholarly literature also shows that "prevent or significantly interfere" was commonly understood to be the rule established in *Barnett*. *See, e.g.*, Jeffrey H. Thomas, *Barnett Bank Brings the Business of Insurance to the Attention of Congress*, 20 U. Ark. Little Rock L.J. 129, 140 (1997) ("Accordingly, national banks may sell insurance pursuant to Section 92 subject to Comptroller regulation and state regulation as

long as the state regulation 'does not prevent or significantly interfere with the national bank's exercise of its powers.'" (footnote omitted)); Linda Birkin Tigges, *Functional Regulation of Bank Insurance Activities: The Time Has Come*, 2 N.C. Banking Inst. 455, 466 (1998) ("The OCC acknowledges that the Court in Barnett indicated that their decision did not 'deprive [s]tates of the power to regulate national banks where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers.'" (footnote omitted)). Even OCC attorneys, in discussing *Barnett* in a scholarly work, recognized that "it seems clear from Barnett and the related cases that state law should not apply where the law significantly qualifies the exercise of a national bank's powers. . . ." Julie L. Williams, Stuart E. Feldstein & Karen E. McSweeney, *After Barnett: The Intersection of National Bank Insurance Powers and State Regulation*, 1 N.C. Banking Inst. 13, 28 (1997). Therefore, the courts, legal scholars, and even the OCC recognized the importance of the "prevent or significantly interfere" standard articulated in *Barnett*.

C. The statutory context of "prevent or significantly interfere" indicates its heightened threshold for preemption of certain statutes.

Another consideration with respect to the language of Section 104(d)(2)(A) is the use of similar but different language in nearby sections relating to State laws and bank insurance activities. Section 104(c)(1)[7] explains that except as otherwise provided, no State may "prevent or

[7] 15 U.S.C. § 6701(c)(1) (Supp. 2001).

restrict" affiliations concerning banks and affiliates. Section 104(d)(1)[8] provides that (with exceptions, including sales, solicitation, and cross-marketing activities) States may not "prevent or restrict" a bank or its affiliates from engaging in permissible activities. Despite using the phrase "prevent or restrict" in nearby sections, Congress codified "prevent or significantly interfere" in Section 104(d)(2)(A). Surely, use of the phrase "significantly interfere" meant something. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *See Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *Independent Bankers Ass'n of America v. Farm Credit Administration*, 164 F.3d 661, 667 (D.C. Cir. 1999) (quoting *Russello*, 464 U.S. at 23).

By directly tying the "prevent or significantly interfere" standard to certain types of laws, Congress singled out these laws for heightened protection against preemption, and emphasized the principle that only "significant" interference would place the types of laws mentioned in Section 104(d)(2)(A) at risk of preemption.

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[8] 15 U.S.C. § 6701(d)(1) (Supp. 2001).

III. THE LEGISLATIVE HISTORY ILLUMINATES CONGRESSIONAL INTENT TO CODIFY A HIGH "PREVENT OR SIGNIFICANTLY INTERFERE" PREEMPTION STANDARD.

A. The GLBA Senate Report is based on a clearly erroneous reading of *Barnett*, which conflicts with the plain language of GLBA.

The Senate Report[9] accompanying GLBA contains an erroneous description of *Barnett*. The OCC depends upon this Report to support its construction of Section 104(d)(2)(A), contending that the two are "almost identical." *See* Pet. App. at 44a. Before a clear interpretive error becomes part of judicial precedent, the Court should clarify the meaning of the legislative history of Section 104(d)(2)(A). The Senate Report states that:

> There is an extensive body of case law related to the preemption of State law. For example, in Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103 (1996), the U.S. Supreme Court noted that Federal courts have preempted State laws that "prevent or significantly interfere" with a national bank's exercise of its powers; that "unlawfully encroach" on the rights and privileges of national banks; that "destroy or hamper" national banks' functions; or that "interfere with or impair" national banks' efficiency in performing authorized functions.

S. Rep. No. 106-44 at 13.

The language in the Senate Report is not "almost identical" to the language of Section 104(d)(2)(A). Simply put, Section 104(d)(2)(A) gives precisely one formulation of the preemption standard: "prevent or significantly interfere." The Report gives at least four.

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[9] S. Rep. No. 106-44 (1999).

Of greater concern are the subtle but essential legal mistakes made by the Report's drafter. The Report states that in *Barnett*, the Supreme Court "noted that Federal courts have preempted State laws that 'prevent or significantly interfere' with a national bank's exercise of its powers," and lists three other formulations under which federal courts purportedly preempted State laws. *See* S. Rep. No. 106-44 at 13. The cases from which those phrases are quoted are cases where courts *upheld*, rather than *preempted*, State laws. *See Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 247-252 (1944); *McClellan v. Chipman*, 164 U.S. 347, 358 (1896); and *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869). In fact, *Barnett* explicitly "noted" that these were cases – which it quoted in a string citation that followed the articulation of the "prevent or significantly interfere" standard – where State laws were *not* preempted. *See Barnett*, 517 U.S. at 34 ("[W]here (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers.").

In fact, the preemption standards in those cases all set a high bar for setting aside a State law. *See Anderson*, 321 U.S. at 252 (The infringement was not found to rise to an impermissible level, because it did not rise to the level of an "unlawful encroachment."); *McClellan*, 164 U.S. at 358 ("[A]ny limitation by a state on the making of contracts is a restraint upon the power of a national bank . . . but the question which we determine is whether it is such a regulation as violates the act of congress."); *National Bank*, 76 U.S. (9 Wall.) at 362 ("It is only when State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.").

By lumping "prevent or significantly interfere" in with at least three other standards mentioned in *Barnett*, the Report dilutes the meaning of "prevent or significantly interfere." If the string citation cases illustrate anything, however, it is that the Supreme Court deliberately tied the words "prevent or significantly interfere" to cases

signifying that a high level of interference is required before the Supreme Court will preempt State law.

B. The GLBA Senate Report is not persuasive legislative authority.

Not only is the above-quoted passage of the Senate Report based on a demonstrably erroneous statement of the legal standard established by *Barnett*, a proper understanding of GLBA's legislative history indicates it is not controlling authority. In fact, the part of the Report that analyzes the actual text of the bill section-by-section contains no reference to the *Barnett* string citation, but in relevant part states, rather succinctly and correctly, the preemption rule stated in *Barnett* – that "prevent or significantly interfere" provides the controlling language.[10] Because "inconsistent history certainly cannot override plain language," the incorrect explanation of *Barnett* on page 13 of the Senate Report must be discarded. *Qi-Zhou v. Meissner*, 70 F.3d 136, 140 (D.C. Cir. 1995).

Additionally, the United States Senator who authored Section 104(d)(2)(A), Senator Richard Bryan, took issue with page 13 of the Senate Report. With respect to the *Barnett* language, Sen. Bryan stated that "[t]he Committee Print disregarded the Supreme Court's holding in [*Barnett*], regarding the standard for preempting State regulation of insurance sales activity." 145 Cong. Rec. S6046 (daily ed. May 26, 1999) (statement of Sen. Bryan).

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[10] "Section 104(d)(2)(A) then establishes the general preemption rule that applies to state regulation of insurance sales, solicitation or cross-marketing activities. In accordance with the legal standards for preemption set forth in the decision of the Supreme Court [in *Barnett*], no State may prevent or significantly interfere with the ability of an insured depository institution, or a subsidiary or affiliate thereof, to engage in insurance sales, solicitation and cross-marketing activities." S. Rep. No. 106-44 at 22.

Sen. Bryan made clear he was referring to the *Barnett* string citation erroneously summarized on page 13. "The 'prevent or significantly interfere' language was taken directly from the Supreme Court's Barnett decision and is intended to codify that decision." *Id.* He further noted that the Report "attempts to clarify the core preemption standard in a way that is contrary to the meaning of the provision." *Id.* Referencing the language concerning impairment of national banks' efficiency, Sen. Bryan stated that the

> paraphrase . . . is correct [sic] and harmful. It is incorrect because it implies that it applies to any authorized function. . . . [It] is harmful because it could dramatically expand the scope of the preemption provision. It could do so if read to prohibit the application of any State law that impairs a national bank's or its affiliate's or subsidiary's efficiency in selling insurance. The Barnett opinion does not support any such reading.

Id. at S6046-S6047. Sen. Bryan's comments should remove any confusion created by the incorrect use of the *Barnett* string citation.

Given his role as author of Section 104(d)(2)(A), Sen. Bryan's clarifying words are entitled to significant deference. "As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (citations omitted). Another case stated that the statements of the Senate manager of a piece of legislation were to be afforded "great weight." *Browder v. Tipton*, 630 F.2d 1149, 1151-1152 (6th Cir. 1980) (footnote omitted).

Further, the Conference Report[11] is consistent with Sen. Bryan's remarks, and contains no reference to the

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[11] H.R. Conf. Rep. No. 106-434, *reprinted in* 1999 U.S.C.C.A.N. 245.

Barnett string citation. The Conference Report states succinctly the interpretive rule: "With respect to insurance sales, solicitations, and cross-marketing, States may not prevent or significantly interfere with the activities of depository institutions or their affiliates, as set forth in *Barnett*. . . . " H.R. Conf. Rep. No. 106-434 at 5, *reprinted in* 1999 U.S.C.C.A.N. at 251.

The relationship between the Senate Report and the Conference Report indicates that any conflict should be resolved in favor of the unambiguous Conference Report. "The most authoritative report is a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body." *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 537 (7th Cir. 1991). The reason for looking to the Conference Report is that "when choosing between inconsistent pieces of legislative history, two houses are better than one." *Id.* In this case, the Conference Report clearly articulates the interpretive rule the Senate Report misstates. "Given the clear language of the statute, selected and arguably ambiguous snippets of the legislative history are insufficient to undermine that language." *Independent Bankers*, 164 F.3d at 668 (citation omitted). Thus, the overwhelming conclusion is that the standard for preemption of State laws affecting insurance sales, solicitation, and cross-marketing activities of national banks is "prevent or significantly interfere," and that this standard establishes a high bar for anyone challenging such a law to meet.

IV. THE OCC'S INTERPRETATION OF GLBA IS NOT ENTITLED TO DEFERENCE.

The OCC's interpretation of Section 104(d)(2)(A) is not entitled to deference typically associated with matters within an agency's expertise. First, there is no indication that Congress granted the OCC sweeping preemption authority through flawed interpretations of statutory and judicial standards.

Second, the OCC's interpretation of a provision of GLBA falls outside the scope of the deference typically granted to agencies. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984), is the seminal federal case on deference to agency interpretations of federal statutes. The standard of agency review concerned "an agency's construction of the statute it administers. . . . " *Id.* at 842. The Supreme Court noted that "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." *Id.* at 844. GLBA, however, is not a statute for the OCC to administer. Whatever interpretive deference may afforded the OCC for statutes within Title 12 of the U.S. Code, the Banks and Banking Code, cannot be said to extend to Section 104(d)(2)(A), which resides in Title 15.

The Fourth Circuit deferred to the OCC's interpretation on the grounds that its opinion met the standard for "persuasiveness" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Fourth Circuit's perfunctory deference to the OCC's interpretation did not indicate why the OCC's opinion was "persuasive." As demonstrated above, the OCC's interpretation is so contrary to the plain language of Section 104(d)(2)(A), preemption jurisprudence, and Congressional intent that its opinion cannot be held to have the "power to persuade." *Skidmore*, 323 U.S. at 140.

Additionally, this is not a case where Congress has given a federal agency "a unique role in determining the scope of [a statute's] preemptive effect." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495-496 (1996). Nor does the OCC "bring the benefit of specialized experience" in giving meaning to the words "prevent or significantly interfere." *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). GLBA does not give the OCC the authority to interpret GLBA. Whatever authority the OCC may have with respect to opining on the effect of State laws on banking activities does not extend to GLBA itself, and it certainly does not extend to nullifying unilaterally the words

"prevent or significantly interfere." While there is a preemption standard stated in GLBA, it is for the courts to apply, not the OCC. The Fourth Circuit, however, did not apply the "prevent or significantly interfere" standard to the laws at issue, but accepted at face value the OCC's conclusions based on a misapplication of Congress' clearly expressed will. In order to restore Congressional intent, it is important that this Court vindicate that preemption standard lest it be improperly re-fashioned into a tool to abrogate state law.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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